Supreme Court, U.S.
FILED

001816 JUN - 4 2001

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No.

In the

Supreme Court of the United States

RAYMOND G. VARGA; KATHRYN M. VARGA,

Petitioner,

versus

ROCKWELL INTERNATIONAL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), did the Court of Appeals use an abrogated standard for reviewing evidence for judgment as a matter of law?

2. After the Court of Appeals Chief Judge termed defendant's actions and arguments regarding withholding of evidence as "Fraud on the Court Rules", and held that a party may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence, should there not be corrective action for such Fraud on the Court Rules?

PARTIES TO THE PROCEEDINGS

Petitioners

Raymond G. Varga and Kathryn V. Varga.

Respondent

Rockwell International Corporation.

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Raymond G. Varga and Kathryn V. Varga respectfully request that this Court issue a Writ of Certiorari to review the Judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 242 F.3d 693 (6th Cir. 2000), and is reproduced in App. A at 1a-15a. The opinion and order of the United States District Court for the Eastern District of Michigan denying plaintiff's motion for a new trial or a judgment as a matter of law is unreported and is reproduced in App. B at 1b-2b.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on March 5, 2001. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part: "It shall be unlawful for an employer ... to discharge an individual ... because of such individual's age. ..."

Federal Rules of Civil Procedure 50 provides, in pertinent part:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue....

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment - and may alternatively request a new trial or join a motion for a new trial under Rule 59...

Federal Rule of Civil Procedure 26 provides, in pertinent part:

> (b) Discovery Scope and Limits. Unless otherwise limited ... , the scope of discovery is follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery ..., including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and locations of persons having knowledge of any discoverable matter....

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner, Raymond G. Varga, brought this age discrimination suit against Respondent, Rockwell International Corporation, which fired Mr. Varga when he was 52 years of age and after he had worked 28 years for defendant. (R. 1.) After the parties had discovery, and after orders compelling production of documents were entered and seemingly complied with, the district court denied defendant's summary judgment motion and set the case for trial by jury. (R. 81).

The parties held a 12-day trial in which the jury heard Mr. Varga's evidence that defendant's decision maker

was biased because of Mr. Varga's age, defendant's evidence that it had discharged Mr. Varga and other employees as a result of a reduction in force, and that Mr. Varga was terminated because he did not have the skill sets necessary for continuation with the company. Mr. Varga also provided his response that he was immediately replaced by a younger worker, and other younger workers were kept in his department who were less educated, less qualified and less experienced then Mr. Varga; that he always had positive performance evaluations with no disciplinary actions and that he had engineering skills which were more comprehensive then those of the younger individuals who were retained, and thus could not explain his termination by defendant. Plaintiff also presented statistical evidence demonstrating that age, more likely than not, could not have been a neutral factor in the selection of the individuals who were terminated as a result of defendant's reduction in force.

During the trial, the district court denied both plaintiff's and defendant's motions for judgment as a matter of law. The jury returned a verdict for defendant.

After reviewing the evidence, the Sixth Circuit affirmed the judgment of the district court, evaluating the evidence under a standard which was aborgated by Reeves v Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). The Court of Appeals incorrectly reviewed the case at bar, perceiving that the standard for judgment as a matter of law was much higher than the standard required for summary judgment. (App. A, 15a, Footnote 2).

Following is a summary of the evidence offered by the parties at trial which demonstrates that Mr. Varga had

satisfied his burden that defendant had willfully discharged him because of his age.

(B) Mr. Varga's Evidence of Age Discrimination

Raymond Varga began work for defendant when he was 24 years of age. Throughout Mr. Varga's work history he performed at above satisfactory levels. His last five performance appraisals reflected ratings of good; excellent minus; excellent; excellent; and good + (R. 135, Ex. 1). Plaintiff's immediate supervisor for each of the foregoing appraisals was Lawrence Lemanski, who was himself terminated by defendant in early 1996 (R. 148, Lemanski TR Vol. 2, Part 2, pg. 6).

Lemanski's immediate supervisor, Ron Rogers, directed Lemanski to lower workers' performance evaluations during the last year he performed such evaluations. Testimony by Lemanski revealed: "Regardless of the job, it was stressed to bring them [evaluations] down." (R. 148, Lemanski TR Vol. 2, Part 2, pg. 15). Lemanski was told by Rogers that the bottom 10% of the people were going to be let go, and they were going to be replaced with young engineers (R. 148, Lemanski TR Vol.2, Part 2, gp. 15). Nevertheless, Rogers testified at trial that Mr. Varga was not in the bottom 10%. Rogers made it clear that plaintiff's termination was "not performance based." (R. 151, Lemanski TR Vol. 4-B, pg. 116). Regardless, Lemanski was instructed to lower Mr. Varga's last performance evaluation to a "good +" instead of the "excellent minus" which Lemanski had intended to give plaintiff. (R. 148, Lemanski TR Vol. 2, Part 2, pg. 29).

After his termination, plaintiff was immediately replaced by a younger individual, Steve Federighe. (R. 151, Rogers TR Vol. 4-B, pp. 92-93). Additionally, Kenneth Lang, another younger individual, was retained in the department, instead of plaintiff. Lang had only been employed with Rockwell for a period of eight months total, full-time employment, this being a combination of part-time and co-op experience. (R. 151, Rogers TR Vol. 4-B, pg. 84).

Mr. Varga provided unrefuted evidence of his skills and capabilities. Plaintiff's experience included, inter alia, design engineering, reliability engineering, product safety assignments, vehicle testing, computer databasing/programming and ISO 9000. Within the department from which he was terminated, plaintiff created the department's fleet test database. He did vehicle testing, working on the following product lines: transmissions, clutches, shift knobs, splitters, unitized trailer hubs, disc brakes, slack adjusters, driveline, axle lock nuts and seal tests. (R. 146, Varga TR Vol. 1, pp 59-97). Nothing in Mr. Varga's personnel file suggests a performance problem. There was no evidence provided during trial to indicate that plaintiff was not qualified to continue his position.

The decision as to which employee in the vehicle engineering department would be terminated was left to Ron Rogers. (R. 151, Rogers TR Vol. 4-B, pp. 16-22 and R. 151, Brown TR Vol. 4-B, pg. 60).

Rogers testified that he reviewed performance and skills retention of his employees in selecting those who would be terminated. (R. 151, Rogers TR Vol. 4-B, pg. 118). However, Rogers admitted that he had not included Ken Lang, the retained younger individual, in the evaluation

process, as he had recently joined the department, and "cost them significant money to bring him up a few months earlier" (only eight months before plaintiff was terminated), and it would not been "fair" to judge someone who was just "barely in the door." (R. 151, Rogers TR Vol. 4-B, pp. 118-119). Moreover, Kenneth Lang had not even had a performance evaluation in plaintiff's department by any supervisor. (R. 151, Rogers TR Vol. 4-B, pg. 121).

Plaintiff also offered statistical evidence by their expert, Michael Thompson, Ph.D., demonstrating that of the employee population under 50 years of age at the time of Mr. Varga's termination, only 3.6% were fired. Of the employee population over 50 years of age, 28.3% were fired. Dr. Thompson opined that the odds of this occurring is 1 in 10,000.00, if the process was age neutral. Dr. Thompson opined further that statistical evidence suggested that the process at Rockwell was not an age neutral process. (R. 153, Thompson TR Vol. 6, pp. 24-25).

C. Rockwell International Corporation's Articulation of Reasons for Discharge Decision

Rockwell's defense consisted of allegations that a legitimate, non-discriminatory reason motivated the adverse employment action, specifically, a reduction in force. (R. 155, Yost TR Vol. 8, Part 1, pp 9-11). This was followed also by other explanations such as defendant's undergoing a restructuring. (R. 155, Yost TR Vol. 8, Part 1, pp. 76-77 and R. 151, Brown TR Vol. 4-5, pg. 60).

Defendant's corporate designee admitted that there were no written criteria related to how individuals were to be selected for the reduction in force and/or restructuring.

(R. 151, Brown TR Vol. 4-B, pg. 57). Rogers, defendant's first line supervisor who was responsible for the final decision for terminations in his department, stated that the criteria he used to evaluate Mr. Varga with the other individuals in his department was "performance and skills retention." (R. 151, Rogers TR Vol. 4-B, pg. 118). However, defendant could not describe what skills in particular defendant wanted to retain, which Mr. Varga did not have. Even defendant's Human Resources Manager was unaware of the skill sets needed in Rogers' department (R. 156, Hannon TR Vol. 8, Part 2, pp. 96-97).

D. Petitioner's Evidence of Pretext

Mr. Varga presented evidence that he was a valuable and highly skilled employee for defendant. Larry Lemanski was his direct line supervisor for the last five years prior to Lemanski's own termination six months before plaintiff's termination. Lemanski testified that Ray Varga was an organizer, was meticulous in his work, added a lot of value, would travel when it was required, and was given the special selected job of coordinating the ISO 9000 efforts within the entire engineering group, and not just within his own department. (R. 148, Lemanski TR Vol. 2, pp. 9-16).

After Lemanski's termination, Rogers supervised Mr. Varga for a few months, and admitted that plaintiff was "not let go for performance reasons." Further, Rogers himself had picked Mr. Varga to represent the department for ISO 9000, which he handled well. Rogers testified that Mr. Varga was not in the bottom 10%, and stated that Mr. Varga was "not a bad performer." (TR 151, Rogers Vol. 4-B, pp. 76-79).

Neither supervisor, Lemanski nor Rogers, evaluated Ken Lang with regard to performance. Lemanski stated that Ken Lang was not in the department long enough for Lemanski to do a performance appraisal. (R. 148, Lemanski TR Vol. 2, pg. 24). Rogers did not evaluate Ken Lang versus Ray Varga because it had "cost them significant money" to bring Ken Lang into their department, and he felt that it would be unfair to judge him against someone who had been there 28 years. (R. 151, Rogers TR Vol. 4-B, pg. 119). Essentially, there was no legitimate effort to evaluate skill sets between younger employees and Mr. Varga by Ron Rogers, the individual making the final determination to terminate Mr. Varga. A younger individual was given preferential treatment simply because he did not have as much experience as Mr. Varga.

Plaintiff also presented evidence showing that defendant's statement of a reduction in force was pretextual. While 25 engineers and/or engineering positions were eliminated at defendant's Troy facility in 1996, at least 27 new engineers were subsequently hired, within a few months, to work at the same facility. (R. 158, G. Brown, TR Vol. 10, pg. 19). Further, defendant hired 200 new engineers worldwide between January 1995 and December 1997, while at the same time stating that they were in the midst of a reduction in force in 1996. (R. 151, G. Brown, TR Vol. 4-B, pg. 52).

Testimony was also given by Larry Lemanski reflecting age bias on the part of his own supervisor, Ron Rogers, who was the decision-maker concerning individuals selected for termination. Statements such as "aging of the labs" referring to the workforce, were made by Ron Rogers (R. 148, Lemanski TR Vol. 2, pg. 22). Lemanski also testified that if someone came into his department who was

brand new, he was instructed that he could not consider them for the bottom 10% ... "there was preference given to the youth that came in, as opposed to the people who had already been there." (R. 149, Lemanski TR Vol. 3, pg. 68).

While defendant claimed to be in the midst of a reduction in force, the corporate designee admitted that defendant was recruiting young college graduates for hire. (R. 151, Brown TR Vol. 4-B, pg. 62). This was confirmed by the testimony of former HR Manager Douglas Gee, who stated that there was a philosophy of hiring new young college graduates each year. The goal for 1996 was to hire 80 per year. (R. 149, Gee TR Vol. 3, pg. 99).

Plaintiff's economic expert, Michael Thomspon, Ph.D. testified that he observed a large disparity of difference, according to age, when he ran his statistical analysis. (R. 153, Thompson TR Vol. 6, pg. 23). He found that 25% of employees over 50 had been fired, and when breaking this number down into individuals over 60, 33% over 60 had been fired, compared to only 3.6% of those under age 50 who were fired. When taking all ages over 50, 28.3% had been terminated. As stated by Dr. Thompson, the odds of this occurring is 1 in 10,000.00 if the process was age neutral. (R. 153, Thompson, TR Vol. 6, pp. 24-25).

Adverse inferences can be drawn from all of the above. Defendant lacked any evidence of performance deficiencies by plaintiff. They had no legitimate explanation for their disparate treatment of Mr. Varga versus younger employees in the company. The CEO even admitted, in testimony, that he would be "extremely disappointed if all

employees had not been evaluated equally across the board." (R. 156, Yost, TR Vol. 8, Part 1, pg. 99).

E. Discovery Withheld By Defendant

The Court of Appeals highlighted the egregiousness of defendant's actions in withholding two specific documents, Exhibits 69 and 70. Defendant's decision to withhold these documents because they viewed them as usable solely for impeachment purposes, according to Judge Batchelder, was "so devoid of merit as to be species." (App. A, 5a) However, the Court of Appeals made light of the other documents which were not produced by defendant, which were just as significant.

During the course of trial, defendant introduced material, heretofore not produced, which was incorrect, incomplete and false. Among the documents which were not provided were the "Redesign Headcount Implementation - Reduction Form" for each individual who was laid off as part of the reduction in force. Testimony by Gregory Brown indicated that every individual who was laid off would have a corresponding Headcount Reduction Form. (R. 151, G. Brown, TR Vol. 4-B, pp. 52-55). Pat Hannon, defendant's HR manager, corroborated this fact. (R. 156, Hannon TR Vol. 8, Part 2, pp. 92-93). Nonetheless, plaintiffs were not provided with a form for each individual who was listed as having been laid off or terminated as part of the reduction in force.

The Court of Appeals minimized the significance and relevance of not producing these documents. However, the fact that defendant did not produce the forms was a blatant violation of Rule 26(b). Here, again, defendant held back

materials which were responsive to a proper discovery request.

Defendant also produced varied and contradictory evidence during trial relative to the exact number of individuals terminated by defendant's restructuring/reduction in force. Defendant's pre-trial exhibits listed 25 people as having been terminated. Then, during trial, defendant testified that 46 people were "affected" by the "redesign". (R. 158, G. Brown, TR Vol. 10, pp. 31-33). Defendant was unable to reconcile the data provided pre-trial with that given during trial. In it's attempt to explain the obvious discrepancy, defendant's corporate designee stated that people may have been "caught up sometime later" than their previously provided form would have shown. (R. 158, G. Brown, TR Vol. 10, pp. 34-35). This was then contradicted by Pat Hannon, Human Resources Manager, who testified that "no additional names were added to the list of persons to be reduced." (R. 156, P. Hannon, TR Vol. 8, Part 2, pp. 42-43).

The trial judge even expressed concern over apparent discovery abuses by defendant. Judge Tarnow was "troubled" by Mr. Brown's testimony, which "basically indicated for the first time, as a result of his testimony a week or two ago, that he did some research, ..." This "research" was done during trial. (R. 158, Court/Counsel, TR Vol. 10, pp. 165-166). Such research should have been done during discovery, and not after trial started.

The most harmful of defendant's "surprise" information, offered to the jury during trial, and later proven to be false, was testimony by Gregory Brown stating that out of twenty individuals who had been listed as severed as part of the reduction in force, ten had actually taken early

retirement. Of the ten that remained, four were over 50 and six were under 50. (R. 158, Brown, TR Vol. 10, pp. 12-14). This information was vehemently objected to. Nonetheless, Mr. Brown was permitted to testify along these lines, over plaintiff's objection. (R. 158, Brown, Vol. 10, pp. 11, 16-17, 27).

Brown's information (1) came as a complete surprise; (2) did not coincide with exhibits and documents provided previously; and (3) was false. Further, the only reason the falsity of this information came to light, was because plaintiffs were aware that some of the individuals cited by Brown as having taken "early retirement" were actually part of another age discrimination lawsuit against Rockwell.

Upon doing "further research" defendant found out that the corporate designee had been incorrect in portraying to the jury that ten people had taken "early retirement." Regardless, the jury heard the incorrect information, took notes on the incorrect information, and clearly did not understand the negation of the incorrect information, as seen in their final verdict.

While plaintiffs did request sanctions against defendant for these discovery abuses, specifically for the unfair surprise and the unjust and prejudicial effect this had on the jury (R. 158, Court/Counsel TR Vol. 10, pp. 163-164), sanctions were not awarded. Instead, the parties agreed to a stipulation to be read to the jury. However, plaintiffs assert that the stipulation was read incorrectly, and even after objection by plaintiffs, the stipulation was not corrected. (R. 159, Court/Counsel, TR 11, pp. 94-97).

The above mentioned abuses are not all-inclusive. They affected the foundation of plaintiffs' case, as well as the outcome of the case. Jurors were confused, and testimony which was inaccurately given by defendant could not be erased from the jurors' minds.

F. The Jury Verdict

The jury received instructions from the trial judge. However, these instructions did not include instructions which conform with the analysis contained in Reeves v. Sanderson Plumbing Products, Inc. The jury found no cause for action in favor of defendant.

G. The Appeal

The Sixth Circuit reviewed evidence pursuant to Toth v. Yoder, 749 F.2d 1990 (6th Cir. 1984) and decided that petitioner had produced insufficient evidence to carry a motion for judgment as a matter of law. The court found that the evidence "recounted in plaintiffs' brief would be enough to withstand summary judgment, but the standard for judgment as a matter of law is much higher." (App. A, 15a, Footnote 2)

The court found plaintiff's arguments, outside of the request for judgment as a matter of law, to be completely meritless. However, the court spent a great deal of time reprimanding defendants for not producing evidence which they had a duty to produce prior to trial.

The court recognized that plaintiffs had propounded discovery requests to Rockwell to produce;

> any and all documents including, but not limited to, inter- and/or intra-office documents, relating to the layoff and termination of Raymond Varga ... Any and all documents containing an analysis of plaintiff and/or comparison of plaintiff to other employees, which served as a basis for a decision to layoff and/or terminate Raymond Varga ... plaintiffs noticed a subpoena duces tecum to Rockwell, specifically asking for 'any memoranda, notes, or other documents referring to the implementation of defendant's RIF plan that resulted in plaintiff's separation on August 26, 1996.' (App. A, 4a-5a)

The court also noted that Gregory Brown, Rockwell's corporate designee, had not produced all of the documents requested. Defendants were then ordered to provide "all of the documents identified at Mr. Brown's deposition, to the extent they exist." (App. A, 4a-5a). However, Trial Exhibits 69 and 70 were not produced in response to that order.

The court found that there was a paucity of authority to support Rockwell's contention that they were allowed to hold back documents. At oral argument defense counsel was asked to explain the absence of cases supporting their contention that a party, served with specific discovery requests, may withhold otherwise relevant evidence if that party unilaterally concludes that the only useful purpose for the evidence at trial is impeachment. Not finding the response had merit, Chief Judge Martin accused defense counsel of having committed fraud on the court rules.

The court, in its decision, found defendant's response to be "nonsense" (App. A, 6a) when defendant posited that the lack of published cases "suggests that Rockwell's rule is one that is universally accepted among all trial lawyers and judges alike." The court took this occasion to "emphasize what Rule 26(b) makes perfectly clear":

> The recipient of a properly propounded document request must produce all responsive, non-privileged documents without regard to the recipient's view of how that information might be used at trial. A party may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence at trial."[1] (App. A, 7a)

The Court of Appeals, while admonishing defendant, sends a message that the Court Rules are meaningless, as nothing will be done about violation of those Rules, nor about the judge-termed "fraud on the court rules." The significance of the Court of Appeals' dictum regarding Rule 26(b) is miniscule, if defendant is not held accountable for it's violation. Defendant's attorneys had a duty to be completely honest in conducting litigation. As the court stated in oral argument, had plaintiffs been made aware of defendants' surprise evidence, they may have very well

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[1] Rockwell's post-argument attempt to justify its failure to disclose these properly requested documents on the basis of Halbasch v Med-Data, Inc., 192 F.R.D. 641 (D. Or. 2000), a case dealing with with Rule 26(a)(3)'s exception to the automatic disclosure requirements for evidence to be used "solely for impeachment purposes," is disingenuous at best.

made different decisions in pursuing their case, and/or would have had an opportunity to investigate the contents of the documents which were not produced.

SUMMARY OF ARGUMENT

The Sixth Circuit held that proof that a member of the disfavored class was replaced by a member of the favored class, combined with evidence that the employer's explanation is pretextual and with additional circumstantial evidence, are insufficient to grant judgment as a matter of law. They have further stated that the standard of the review of evidence is "much higher" for judgment as a matter of law, than it is for summary judgment. This contravenes Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). The Reeves court expressly stated that "the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." Id, at 150 citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251, (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The fact that Mr. Varga was replaced by a younger employee, with still another younger employee also being retained in Mr. Varga's engineering department, and the fact that the younger employee was not evaluated against Mr. Varga for possible selection for termination, thus being given preferential treatment, leaves the logical inference that age is the reason for Mr. Varga's termination.

Additionally,

> (1) Evidence shows that there were no guidelines and/or written criteria

for selection of employees to be eliminated;

(2) Evidence shows there was active recruitment of college graduate engineers, with a targeted goal of hiring 80 such graduates slated to be hired in the same year that petitioner was terminated, while defendant purported to be conducting a "reduction in force";

(3) Evidence confirmed that defendant hired 27 engineers, when at least 25 engineers were terminated as a result of defendant's RIF; and,

(4) Statistical evidence demonstrated that a disproportionate number of employees over 50 were terminated as compared to the entire population of individuals terminated during defendant's reduction in force.

The above enumerated proofs provide circumstantial evidence sufficient to cause a jury to infer that age bias was the cause of Mr. Varga's dismissal.

The Court of Appeals stopped short of issuing a ruling which would have significance to parties who do not comply with the Federal Court Rules to disclose evidence in response to properly propounded requests. At best, parties who violate the Court Rules are assured, from this decision, that nothing meaninful and of consequence will happen for such violations.

REASONS FOR GRANTING THE WRIT

I. In light Of Reeves v Sanderson Plumbing Products, Inc., The Proper Interpretation of The Evidence Which Should Be Reviewed To Determine Whether Judgment As A Matter Of Law Should Be Granted is The Same Standard Used In Considering A Summary Judgment Motion.

Prior to Reeves v. Sanderson Plumbing Products, Inc., the Courts of Appeals have articulated differing formulations as to what evidence a court is to consider in ruling on a motion for judgment as a matter of law. Reeves, at 149. See also Venture Technology, Inc. v. National Fuel Gas Distribution Corp., decided with Schwimmer v. Sony Corp. of America, 459 U.S. 1007, 1009 (1982).

Some decisions, according to Reeves, have stated that "review is limited to that evidence favorable to the non-moving party. See, e.g., Aparicio v. Norfolk and Western R. Co., 84 F.3d 803, 807 (6th Cir. 1996)" Id at 149. However, "most Courts of Appeals have held that review extends to the entire record, drawing all reasonable inferences in favor of the non-movant. See, e.g., Tate v. Government Employees Ins. Co., 997 F.2d 1433, 1436 (11th Cir. 1993); Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)." Id at 150.

The Reeves court abrogated the opinion in Aparicio, by stating that the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law. While the court recognized that all reasonable inferences must be drawn in the favor of the non-moving party, Judge

O'Connor explained that "the court should give credence to the evidence favoring the non-movant, as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses," citing Wright & A. Miller, Federal Practice and Procedure §2529, at 300(2d ed. 1995).

The Sixth Circuit, herein, ignored the evidence supporting plaintiff, which was uncontradicted and unimpeached, and which came from disinterested witnesses.

First, plaintiff was replaced by a younger individual, Steve Federighe, with yet another younger employee, Ken Lang, also being retained in Mr. Varga's department. This testimony was proffered by Ron Rogers, Mr. Varga's first-line supervisor at the time of his termination.

Also uncontradicted is the fact that defendant had an active recruiting program for college graduates, and was planning to hire 80 new college graduate engineers in the same year that defendant claims they were undergoing a reduction in force.

Unrefuted, is the fact that Ken Lang, a younger employee, was not evaluated against Raymond Varga, when the selection was being made to terminate employees under the RIF. Unrefuted also is the fact that Raymond Varga had the qualifications for his position, that he was not in the bottom 10% of the workforce, which had been targeted for reduction, and that he had positive performance reviews and no disciplinary actions during his entire 28 years of service.

Plaintiffs also presented uncontradicted statistical evidence revealing that older individuals were terminated in

significantly higher numbers (28.3% of individuals over 50 years were fired) versus a significantly lower number of individuals who were under 50 who were fired (3.6%). While defendants presented an "Adverse Impact Analysis" which showed "that after the layoffs, the average age of Rockwell's workforce was reduced by 0.1 years" (App. A, 14a), this study did not purport to be a statistical analysis such as that done by plaintiffs' expert, Dr. Michael Thompson. Defendant's Adverse Impact Analysis merely averaged the ages of over 660 employees before the RIF, with a second averaging of ages after reducing the total work population by the 27 employees who were terminated as a result of the purported RIF. (R. 156, Hannon, TR Vol. 8, Part 2, pg. 101). This "impact study" did not analyze what percentage of the employee population over 50 and under 50 were actually let go.

As in Reeves, the Sixth Circuit "disregarded critical evidence favorable to petitioner - namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation." Id at 152.

In light of the Reeves case, the case herein should be remanded for a new trial, to afford petitioner the opportunity to present jury instructions utilizing the analyses in Reeves, and/or in the alternative, judgment as a matter of law should be afforded petitioner given the uncontradicted and unimpeached evidence presented by petitioner which supports a finding that age was a factor in the termination of Raymond Varga from his employment with defendant.

II. Fraud On The Court Rules Is Essentially Fraud On the Court And Defendant Should Be Held Accountable For Willfully And Intentionally Violating The Court Rules.

The Court of Appeals spent a great deal of time reprimanding defendants for not producing documents which defendant felt they had no duty to produce. It is difficult to understand and justify the detailed reprimand given by the court to defendants, with the court's ultimate conclusion that the defendant's violations are harmless. As stated earlier, during oral arguments Chief Judge Martin accused defense counsel of having perpetrated a "fraud on the court rules." While there is no case law discussing fraud on the court "rules" per se, the result would appear to be similar to cases involving "fraud on the court."

A similar situation existed in Demjanjuk v. Petrovsky, et al., 10 F.3d 338 (6th Cir. 1994), a civil action against government attorneys by John Demjanjuk for the government not having produced properly requested documents, resulting in the extradition of plaintiff to Israel to face indictment of war crimes. While the magnitude of the results in Demjanjuk are of a monumental nature, the principles discussed and ruled upon in said case apply to the case at bar.

Mr. Demjanjuk's discovery requests demonstrated to the court that he had "asked for virtually every piece of evidence that is at issue in these proceedings, but the government did not provide the evidence because it believed it was under no duty to do so." Id at 348.

The court in Demjanjuk explains that "cases dealing with fraud on the court often turn on whether the improper

actions are those of parties alone, or if the attorneys in the case are involved. As an officer of the court, every attorney has a duty to be completely honest in conducting litigation." Id at 352. The decision to withhold information from plaintiffs in the case at bar is on point with what occurred in Demjanjuk. It was a direct action by defendant's attorneys. As such, it was not the "party" acting alone when the decision to withhold documents was made.

The final determination of Demjanjuk resulted in the judgment of the district court being vacated on the grounds of prosecutorial misconduct that constituted fraud on the court. The same or similar determination should have been made in Varga.

Defendant should reap the consequences of their actions, and have the judgment of the trial court set aside, and allow for a new trial, or in the alternative, judgment as a matter of law in favor of petitioner.

CONCLUSION

For the reasons stated herein, petitioner would request the grant of certiorari and the vacating and remanding of this case for a new trial in light of the decision in Reeves v. Sanderson Plumbing Products, Inc., a case which was decided during the same week of the parties' oral argument. Petitioner did cite the Reeves case in oral argument on June 16th. However, it was not utilized in the Court of Appeals' analysis of this case.

CONCLUSION

For the reasons stated herein, petitioner would request the grant of certiorari and the vacating and remanding of this case for a new trial in light of the decision in Reeves v. Sanderson Plumbing Products, Inc., a case which was decided during the same week of the parties' oral argument. Petitioner did cite the Reeves case in oral argument on June 16th. However, it was not utilized in the Court of Appeals' analysis of this case.

Respectfully submitted,
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No. 99-1206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Raymond G. Varga; Kathryn M. Varga, Plaintiffs-Appellants,

v.

Rockwell International Corporation, Defendant-Appellee.

June 16, 2000, Argued

March 5, 2001, Decided

March 5, 2001, Filed

COUNSEL:
ARGUED: Eva I. Guerra, LAW OFFICES OF EVA I. GUERRA, W. Bloomfield, Michigan, for Appellants.

Ernest R. Bazzana, PLUNKETT & COONEY, Detroit, Michigan, for Appellee.

ON BRIEF: Eva I. Guerra, LAW OFFICES OF EVA I. GUERRA, W. Bloomfield, Michigan, for Appellants.

Ernest R. Bazzana, PLUNKETT & COONEY, Detroit, Michigan, for Appellee.

JUDGES:
Before: MARTIN Chief Judge; BATCHELDER and MOORE, Circuit Judges.

OPINIONBY:
ALICE M. BATCHELDER

OPINION:

ALICE M. BATCHELDER, Circuit Judge. Plaintiffs Ray and Kathryn Varga appeal the jury's verdict and the district court's entry of judgment in favor of Rockwell International ("Rockwell"), Ray Varga's employer, on the Vargas' federal and state law claims of age discrimination. The Vargas raise numerous claims of evidentiary error at trial, and further assign as error the district court's failure to grant their motion for judgment as a matter of law or, in the alternative, for a new trial. Finding that none of these assignments of error are meritorious, we affirm the judgment of the district court.

I.

In 1995, the Heavy Vehicle System of the Automotive Operations Division of Rockwell (HVS), was performing poorly. The Rockwell Board of Directors insisted that HVS' performance be turned around or the division would be sold or shut down. In early 1996, Management began a program to restructure HVS, described by Rockwell's CEO as taking a "blank paper" approach, with the goal of increasing efficiency and reducing expenses by 40 percent. Managers worldwide were asked to start over and design the most efficient organization possible. The skills of each current employee were then assessed to determine whether and where to place that employee within this new organization.

Ray Varga was employed in the Vehicle Test Group of HVS. That Group consisted of four salaried engineers, of whom Varga was the most senior with 28 years of experience with Rockwell. The other three engineers in the Vehicle Test Group had 22 years', 7 years', and 3 years' experience with Rockwell. Mr. Federighe, an engineer in another work group, had 7 years' experience with Rockwell. As part of the restructuring, Rockwell terminated Varga, retained the other three engineers in the Vehicle Test Group and moved Mr. Federighe into that group. Federighe worked in the Vehicle Test Group for 30-60 days before he was transferred to another department.

Varga and his wife sued Rockwell for wrongful termination and for age discrimination under both the federal age-discrimination laws ("ADEA") and Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"). Rockwell asserted as an affirmative defense that Varga's termination was part of a far-reaching reduction in force ("RIF") affecting employees throughout HVS's entire organization.

Rockwell moved for summary judgment. The district court granted the motion as to the wrongful-termination claim, but denied it as to the age-discrimination claims, allowing those claims to proceed to trial. Pretrial discovery did not go smoothly, and plaintiffs filed a motion to compel the requested discovery. The motion was granted by a magistrate judge and affirmed by the district court over Rockwell's timely objections. The case was tried to a jury, which returned a verdict of "no cause for action" in favor of the defendant. The plaintiffs' motion for judgment as a matter of law or, in the alternative, for a new trial was denied by the district court and this timely appeal followed.

In this appeal, the Vargas argue that certain evidence was erroneously admitted at trial, that they were deprived of information necessary to present their claims because of

Rockwell's stonewalling tactics during discovery, and that they were deprived of a fair trial. We consider each of these alleged errors in turn.

II.

A. **Admissibility of evidence**

1. **Trial exhibits 79 and 80**. Varga's direct supervisor, Larry Lemanski, was also terminated as part of the 1996 RIF. Lemanski and several other RIF'd employees sued Rockwell in a separate lawsuit for violating the ADEA. As a witness in the Vargas' trial, Lemanski testified that he was instructed by his supervisor, Ron Rogers that (1) Rockwell wanted to eliminate the older engineers and replace them with younger engineers, so he should lower evaluation scores that year to facilitate this goal, and (2) he should rank the employees and cut out the bottom 10%. Lemanski testified that he held Varga's work in high regard and would have ranked him in the middle as compared to the other engineers.

On cross-examination, however, Rockwell's lawyers presented Trial Exhibits 69 and 70 to Mr. Lemanski. These exhibits were two draft, handwritten lists ranking the engineers who were under Mr. Lemanski's supervision at that time. On both drafts, Varga was ranked 14th out of 17 engineers. The documents noted the criteria followed by Lemanski in creating the ranking. A note at the bottom of the page read: "Who is doing the best in there [sic] job/classification/[illegible]. This is performance relating to position and how much is contributed to the company effort." On redirect, Lemanski explained that at the time the ranking was created, Varga was on a special assignment under Rogers and, for that reason, Lemanski had discounted Varga's performance for purpose of ranking the engineers as a whole.

It is undisputed that Trial Exhibits 69 and 70 were created during the course of Mr. Lemanski's employment with Rockwell; they were removed from the Rockwell premises by Mr. Lemanski when his employment was terminated; and Rockwell obtained copies of the documents in the course of pretrial discovery in Lemanski's ADEA suit against Rockwell. It is also undisputed that Rockwell never produced copies of Trial Exhibits 69 and 70 in response to the Vargas' discovery requests--which included requests that Rockwell produce "any and all documents including, but not limited to, inter- and/or intra-office documents, relating to the layoff and termination of Raymond Varga" and "any and all documents containing an analysis of plaintiff and/or comparison of plaintiff to other employees, which served as a basis for a decision to layoff and/or terminate Raymond Varga." Finally, it is undisputed that the plaintiffs noticed a subpoena duces tecum to Rockwell, specifically asking for "any memoranda, notes, or other documents referring to the implementation of defendant's RIF plan that resulted in plaintiff's separation on August 26, 1996;" that Gregory Brown was Rockwell's corporate designee in response to the subpoena; that during Brown's deposition, it became apparent that he had not produced all of the documents requested; that the district court, ordered the defendants to provide "all of the documents identified at Mr. Brown's deposition, to the extent they exist;" and that these two documents were not produced in response to that order.

The plaintiffs argue in this appeal that they were unfairly prejudiced by Rockwell's failure to produce these documents before trial, and the district court's decision to allow Rockwell to use the exhibits at trial is reversible error. Rockwell counters that it had no obligation to produce the documents because it viewed them as usable solely for impeachment purposes. As we shall explain below, plaintiffs' claim of error is meritless. But we will

first address Rockwell's argument, which is so devoid of merit as to be specious.

The Federal Rules of Civil Procedure allow litigating parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). The rules are broad, and litigants are required to comply with all properly propounded document requests. Fed. R. Civ. P. 34. While it is arguable that Lemanski's lists were not identified at Brown's deposition, Trial Exhibits 69 and 70 clearly fall within the plaintiffs' original document request, and Rockwell was obligated to produce them.

In support of its decision to hold back the documents, Rockwell cites ***Macivor v. Southern Pacific Transp. Co., 1988 U.S. Dist. LEXIS 5495,*** No. 87-6424- *E, 1988 WL 156743* (D. Or. Jun. 9, 1988). This unpublished, district court opinion is not precedential authority in this Court. More importantly, the case is wholly inapposite. In **Macivor,** the plaintiff-employee, who was suing his employer for damages related to an alleged on-the-job injury, propounded an interrogatory asking if the employer had conducted any secret surveillance of the plaintiff. **Relying on a local rule** that specifically removed such records from discovery **in personal injury cases,** the district court held that the surveillance films were not discoverable. Therefore, Rockwell's out-of-context quote from **Macivor** -". . . the only practical way to preserve the prophylactic effect of impeachment evidence . . . is to keep its existence as well as its contents unknown" - is not only not persuasive, it is misleading.

The paucity of authority to support Rockwell's contention is telling. At oral argument, counsel for Rockwell was asked to explain the absence of cases supporting his rule that a party served with specific

discovery requests may withhold otherwise relevant evidence if that party unilaterally concludes that the only useful purpose for the evidence at trial is impeachment. Counsel responded that the lack of published cases suggests that Rockwell's rule is one that is universally accepted among all trial lawyers and judges alike. That response was a fine debate technique, but it is nonsense. The reason there are no cases to support Rockwell's evidentiary proposition is that it is patently wrong. We take this occasion to emphasize what Rule 26(b) makes perfectly clear: the recipient of a properly propounded document request must produce all responsive, non-privileged documents without regard to the recipient's view of how that information might be used at trial. A party may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence at trial. n1

That said, however, the ultimate question we must consider is not whether Rockwell wrongly withheld the documents, but whether the district court--which was never presented with that question--committed reversible error by allowing Rockwell to use Trial Exhibits 69 and 70 to cross-examine Lemanski. During the trial, when Rockwell offered these documents into evidence, plaintiffs' counsel made no mention of the documents' not having been provided during discovery; although counsel objected to the fact that the documents had no dates on them, once the time frame was established, she made no other objection to either their use or their admission. In fact, as to Trial Exhibit 70, the district court specifically asked plaintiffs' counsel if she had any objection, and she said, "no."

The general rule for reviewing evidentiary rulings on appeal is that a party "may not assert as error the introduction of evidence unless a timely objection is made."

Helminski v. Ayerst Labs., 766 F.2d 208, 211 (6th Cir. 1985). Because plaintiffs failed to object at trial, they may not complain about the admission of these exhibits now.

2. **Testimony of Patrick Hannon.** At trial, Rockwell's Human Resources officer, Patrick Hannon, testified--without reference to any documentation--about various statistics related to the age impact of the RIF. Plaintiffs' counsel objected to the testimony because she had not been provided with the documents supporting it. In fact, the only documentation with regard to this statistical information that Rockwell provided plaintiffs prior to trial was an Adverse Impact Review prepared by a Mr. Pautsch, showing a breakdown of Rockwell's work force by age before and after the RIF. Pautsch's discovery deposition contains his testimony that the Adverse Impact Review was the only documented study that Rockwell conducted; however, plaintiffs' counsel never inquired of him whether there were other, undocumented studies undertaken by Rockwell in connection with the RIF. And although Hannon was included on Rockwell's witness list prior to the close of discovery, plaintiffs' counsel did not attempt to take his deposition. The district court reserved ruling on the issue of whether Rockwell had failed to comply with plaintiffs' discovery request seeking relevant statistics, permitted Hannon to continue to testify from memory about the age-related impact statistics, and allowed the plaintiffs to cross-examine him with regard to the documentation for that testimony.

Rockwell argues it was under no obligation to provide plaintiffs with details of Mr. Hannon's undocumented study because the plaintiffs asked for documents. Further, Rockwell claims that the issue has been waived because plaintiffs neither filed a motion to strike the testimony nor preserved the issue for appeal. As with the Lemanski

documents, we believe that plaintiffs waived their right to pursue this issue on appeal. But, even if the argument was not waived, we would find that it is without merit. Rockwell included Hannon on its witness list, and plaintiffs received that list before the close of discovery. During the trial, the district judge investigated plaintiffs' allegations of unfair surprise, found them to be without merit, and allowed the testimony to continue. The district court did not abuse its discretion here.

3. **Testimony of Gregory Brown.** During the trial, a dispute arose surrounding the testimony of Mr. Brown relating to certain documents provided by Rockwell. On the first day of his testimony, Mr. Brown testified about Trial Exhibit 19, a list of employees who were laid off at the same time Ray Varga was. Mr. Brown testified that of the twenty names on Trial Exhibit 19, ten of them took a voluntary early retirement.

Mr. Brown returned to court the following day and testified that he checked his records overnight and was mistaken in his testimony from the day before. He explained that in order to obtain their pension benefits immediately, several employees who had been selected for layoff applied for early retirement status, and he confirmed that Rockwell's records do not distinguish between those who voluntarily sought early retirement and those who elected early retirement after being selected for layoff.

Plaintiffs' counsel argued that because four of the "early retirement" terminations were plaintiffs in Lemanski's separate lawsuit against Rockwell for age discrimination, at least those four must not have sought early retirement voluntarily. She claimed this new information was unfairly prejudicial because her statistical expert had left all early retirement employees out of his calculations, assuming those had been voluntary terminations. She argued that because

early retirement was available only to those employees age 55 and older, the statistics calculated by her expert--reflecting older workers who were involuntarily terminated--were too low. She also argued vigorously that she had been sandbagged by Rockwell's discovery abuses.

After much discussion, the parties settled the dispute by agreeing to a stipulation that the judge read to the jury:

> The attorneys have stipulated . . . One is that all of the discovery orders and requests have been complied with prior to trial. So, that's not a concern of yours.

As to the second point, when Mr. Brown testified yesterday and talked about early retirement, he indicated that the computer elected early retirement - or showed early retirement for ten people, because that was the last entry or employment action which was taken with respect to each of the employees, the four employees. They were, in fact, included in the reduction in force and were laid off prior to electing the early retirement, and therefore there's no need for Mr. Brown to be called back as a witness. And you should take Exhibit 19 as all the people listed in Exhibit 19 were in fact included in the reduction in force. So, Exhibit 19 is exactly the same as before Mr. Brown testified.

The court then asked, "Does that accurately reflect the agreement, Ms. Guerra [plaintiffs' counsel]?" She responded, "Just the first point I think was a little broader than we had agreed. If we could sidebar." The court denied her request for an immediate sidebar and deferred the issue until the next break. When the court returned to the issue, plaintiffs' counsel complained that during the negotiation of the stipulation, the language about the first point had been that Rockwell's responses to discovery requests had been

"appropriate," but in the stipulation the court had said that Rockwell had complied with all of the discovery requests. The court flatly responded that the stipulation had been limited to the subject of the discovery surrounding the voluntary retirements.

On appeal, plaintiffs reassert the dispute regarding Brown's testimony that the stipulation had purported to resolve, and they challenge the accuracy of the stipulation as it was read to the jury. Rockwell responds that the stipulation is binding, and there is no basis for this Court to consider plaintiffs' claim on appeal.

In this Circuit, "stipulations voluntarily entered by the parties are binding, both on the district court and on us." ***Federal Deposit Ins. Corp. v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991).*** It is clear from the transcript of the proceedings that plaintiffs' counsel was an active participant in drafting the stipulation and that she agreed to the substance of the stipulation with regard to the "voluntary" versus "involuntary" early retirement evidence. Plaintiffs are therefore bound by that portion of the stipulation, as are we, and there is no merit to their complaint that the district court erred in reading it to the jury. Further, the record reflects that the language of the stipulation regarding Rockwell's response to plaintiffs' discovery requests was not exactly the same as the language discussed by the parties during negotiations. The difference, however, is simply not material. The district court held that the jury would not reasonably have concluded that the language referred to anything other than the specific discovery materials to which the remainder of the stipulation was directed. We find no abuse of discretion in that ruling.

4. **The missing headcount forms.** On appeal, plaintiffs complain that during discovery they requested copies of

certain "Headcount Reduction Forms;" that Mr. Brown testified that one such form was completed for each RIF'd employee; and that plaintiffs still have not received copies of those forms. At various times throughout the trial, however, in response to plaintiffs' complaints that some of these forms had not been produced, the district court observed that the information contained on these "headcount forms" in general was minimal, and information which would have been contained in the forms not produced was contained in Trial Exhibit 28. We have reviewed the headcount forms that Rockwell did produce during discovery, and we conclude that the district court's observations were entirely correct. We find it highly unlikely that Rockwell's failure to produce some of these documents altered the outcome of the Vargas' trial. Moreover, the Vargas could and should have raised this issue during pretrial discovery, when a motion to compel could have been considered by the district court, and any failure by Rockwell to produce the documents could have been cured. We find no abuse of discretion here.

We pause to make one additional comment. We have exhaustively reviewed the record before us, and find the bickering between counsel for Rockwell and counsel for the Vargas throughout the pretrial discovery and at trial was remarkable. It is clear that the district court was confronted with unusually contentious counsel, and we commend him on the enormous restraint he exercised in presiding over this matter.

B. **Rebuttal testimony.**

Plaintiffs argue that they were prejudiced by the district court's denial of their request to call Mr. Pautsch as a rebuttal witness. Because Pautsch prepared the Adverse Impact Review for Rockwell, plaintiffs proposed to call him as a rebuttal witness to explain the source of the numbers in

that analysis and to clarify the "confusing" testimony presented by Messrs. Hannon and Brown. Although plaintiffs had deposed Pautsch, he was not on their witness list, nor had he been called as a witness by Rockwell.

We have previously considered the scope of the district court's discretion in admitting rebuttal evidence at trial. See ***Benedict v. United States, 822 F.2d 1426 (6th Cir. 1987).*** In **Benedict**, the plaintiffs argued they should be allowed to present an expert on rebuttal because the trial testimony of defendant's expert (in 1986) contradicted his earlier 1980 opinion. The defendant argued that the plaintiffs should have been on notice, as early as 1983, that the expert's opinion had changed. The district court ruled that the rebuttal testimony would not be allowed because it logically belonged in the plaintiffs' case-in-chief.

In evaluating the propriety of the district court's ruling, this court explained:

> A trial judge's determinations regarding the order of proof and scope of rebuttal testimony will not be disturbed absent an abuse of discretion . . . . In the exercise of sound discretion, the district court may limit the scope of rebuttal testimony, to that which is directed to rebut new evidence or new theories proffered in the defendant's case-in-chief. However, "where . . . [the] evidence is real rebuttal evidence, the fact that it might have been offered in chief does not preclude its admission in rebuttal. Furthermore, with respect to 'real rebuttal evidence,' the plaintiff has no duty to anticipate or to negate a defense theory in plaintiff's case-in-chief.

Id. at 1428.

We reversed the district court in **Benedict** because the proffered testimony was "real rebuttal evidence." Real rebuttal evidence is evidence presented to rebut "new" evidence, and evidence is new "if, under all the facts and circumstances, . . . the evidence was not fairly and adequately presented to the trier of fact before the defendant's case-in-chief." *Id. at 1429.*

In the case before us here, however, we do not believe the rebuttal testimony plaintiffs sought to introduce constitutes "real rebuttal evidence." The district court ruled that plaintiffs knew that Pautsch's impact study was highly relevant to their case; that plaintiffs knew that Hannon was on Rockwell's witness list, but they chose not to depose him in advance of trial to find out what he had to say; and that the testimony plaintiffs contended Pautsch would present in rebuttal was not inconsistent with the testimony plaintiffs wanted to rebut and its substance had already been presented to the jury through direct and cross examination of other witnesses. The record supports those findings. The district court did not abuse its discretion by denying plaintiffs the opportunity to present Pautsch as a rebuttal witness.

C. **Judgment as a matter of law.**

A district court may grant a motion for judgment as a matter of law only if the evidence is such that "reasonable minds could not differ as to the conclusions to be drawn from the evidence." ***Toth v. Yoder, 749 F.2d 1190, 1194 (6th Cir. 1984).*** Plaintiffs argue that they should have been granted a judgment as a matter of law because the evidence in their favor was overwhelming. n2 That is simply not the case.

Plaintiffs are correct in their assertion that there was documented evidence that Varga's supervisors thought he did a good job. Under Rockwell's restructuring plan, however, adequate performance did not guarantee an employee's retention in the restructured organization. Rockwell's management received a directive from the Board of Directors to restructure, reorganize and improve efficiency by 40%. They were not looking to cut dead wood; they were looking to keep only optimal performers. The impact study showed that after the layoffs, the average age of Rockwell's workforce was reduced by 0.1 years. This is not statistically significant. Finally, plaintiffs' key evidence of discriminatory intent came from Larry Lemanski's testimony. But because Lemanski himself was terminated as part of the RIF, a jury easily could have discredited his testimony as being motivated by sour grapes. On this record, it cannot be said that the reasonable minds could not differ on the central question of whether or not Varga's age was the motivating reason for his layoff.

D. **Fed. R. Civ. P. 61.**

Plaintiffs argue that because the district court made so many erroneous evidentiary rulings, their trial was fundamentally unfair and the verdict should be reversed under Fed. R. Civ. P. 61. According to ***Westwood Chemical, Inc. v. Owens-Corning Fiberglas Corp.***, *445 F.2d 911 (6th Cir. 1971)*, a plaintiff must prove that the evidence it was precluded from offering was more than cumulative or that the court abused its discretion before a reversal under Fed. R. Civ. P. 61 is appropriate. See ***id.*** *at 918* ("In short, plaintiff has failed to show that if any of the District Court's evidentiary rulings were erroneous, plaintiff's right to a fair trial was prejudiced."). As we have already discussed, we find no abuse of discretion in any of the evidentiary rulings challenged by the plaintiffs. The

plaintiffs did not present an overwhelming case, and there has been no miscarriage of justice.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

n1 Rockwell's post-argument attempt to justify its failure to disclose these properly requested documents on the basis of ***Halbasch v. Med-Data, Inc., 192 F.R.D. 641 (D. Or. 2000)***, a case dealing with Rule 26(a)(3)'s exception to the automatic disclosure requirements for evidence to be used "solely for impeachment purposes," is disingenuous at best.

n2 Plaintiffs also argue that they presented evidence on all the necessary elements of an age discrimination claim, and that the jury could have inferred discrimination from the evidence. In support of their argument, plaintiffs cite precedents such as ***Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121 (6th Cir. 1998)*** (reversing denial of summary judgment). We agree that the evidence recounted in plaintiffs' brief would be enough to withstand summary judgment, but the standard for judgment as a matter of law is much higher. Plaintiffs' evidence is not sufficient to carry a motion for judgment as a matter of law.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed January 22, 1999]

No. 97-76295

Raymond G. Varga and
Kathryn M. Varga,

Plaintiffs,

V

Rockwell International
Corporation

Defendant.

ORDER

At a session of said Court, held in the U.S. Courthouse and Federal Building, at Detroit, Michigan, on JAN. 22, 1999

PRESENT: HON. ARTHUR J. TARNOW
U.S. DISTRICT JUDGE

The Court has reviewed the motions and supporting

documents. Plaintiff has failed to persuade the Court that reasonable minds could not differ as to the conclusions to be drawn from the evidence. The parties introduced ample testimonial and documentary evidence from which the jury could reasonably and legitimately conclude that Mr. Varga's age was not a motivating factor in the decision to terminate his employment.

The Court finds that Plaintiff was not prejudiced by the discovery process, the six day delay in trial, nor any revelation that a juror may work for a vendor of the Defendant. Therefore, Plaintiff's Motion for New Trial (135-1) or a Judgment as a Matter of Law (135-2) is Hereby **DENIED.**

/s/_____
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

DATED: Jan. 22, 1999